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NO. 90-1082

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HETTIE M. MINNICKS,
as Executrix of the Succession
of Stephen A. Mistich
Petitioner,

versus

BRANDON L. MISTICH,
REBECCA MISTICH TERRASE,
and PATRICIA MONROE MISTICH, as natural tutrix
of SHAWN A. MISTICH
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA STATE COURT OF APPEAL,
FOURTH CIRCUIT

BRIEF OF RESPONDENTS
IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Louisiana Court of Appeal, Fourth Circuit erred in denying the motion to be substituted filed by the executrix of decedent's estate, after it had correctly substituted decedent's children as plaintiffs-appellees under state procedural law, and whether once conceding that the substitution was procedurally correct, the executrix may seek review to this Honorable Court.

LIST OF PARTIES

The parties involved include those set forth in the caption, as well as Brown & Root, Inc., an original defendant in this matter. The parent and subsidiary companies of Brown & Root, Inc. have been previously listed in the Petition for Writ of Certiorari.

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DECISIONS BELOW

1. Judgment in favor of original plaintiff Stephen A. Mistich in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, dated April 28, 1989.

2. Order of the Louisiana Court of Appeal, Fourth Circuit, substituting decedent's children as plaintiffs-appellees, dated January 8, 1990.

3. Denial by the Louisiana Court of Appeal, Fourth Circuit, of the executrix's motion to be substituted, as well as denial of motion to stay proceedings filed by Brown & Root, Inc., dated June 1, 1990.

4. Denial by the Louisiana Court of Appeal, Fourth Circuit, of peremptory exception of no right of action filed by Brown & Root, Inc., dated September 4, 1990 (Appendix 1).

5. Denial by the Supreme Court of the State of Louisiana of application for supervisory and other writs filed by the executrix, dated September 14, 1990.

6. Denial by the Louisiana Court of Appeal, Fourth Circuit, of the petition for intervention filed by the executrix, dated December 28, 1990 (Appendix 2).

STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court is questioned as the decision by the Louisiana Court of Appeal, Fourth Circuit on June 1, 1990 denying the executrix's motion to be substituted as the plaintiff-appellee and the subsequent denial by the Louisiana Supreme Court of the executrix's application for supervisory and other writs on September 14, 1990 involved merely the procedural substitution of parties in accordance with the state's appellate rules. Although the original lawsuit was brought under the Jones Act, 46 U.S.C. Section 688, the general maritime law, the "saving to suitors" clause, 28 U.S.C. Section 1333(1), the assertion by petitioner that the state procedural substitution conflicts with federal decisions, or even involves federal law, is disputed.

STATEMENT OF THE CASE

On December 2, 1986, Stephen A. Mistich (hereinafter sometimes referred to as "Mistich") filed suit in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, pursuant to the "saving to suitors" clause, seeking tort damages for his injuries against Brown & Root, Inc. and other defendants. Several weeks prior to trial, Mistich settled his claims against all co-defendants, except Brown & Root, Inc., and therefore released the former.

After a full trial on the merits lasting seven days, judgment was rendered on April 28, 1989 in favor of Mistich and against Brown & Root, Inc. awarding $3,147,000.00 in compensatory damages and imposing $4,000,000.00 in punitive damages. Reasons for Judgment, thoroughly explaining the trial court's decision, were issued on May 25, 1989.

Subsequent to the rendering of the judgment and prior to the issuance of the reasons for same, Mistich died.

Brown & Root, Inc. suspensively appealed to the Louisiana Court of Appeal for the Fourth Circuit on May 31, 1989.

On January 8, 1990, decedent's children, Brandon L. Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich as natural tutrix of Shawn A. Mistich, were substituted as proper party plaintiffs based upon Louisiana Code of Civil Procedure Article 801, Rule 2-9 of Uniform Rules of Louisiana Courts of Appeal, and Louisiana Civil Code Article 2315.1.

On March 12, 1990, the Court of Appeal entertained oral arguments by Brown & Root, Inc. and the aforenamed children on behalf of the decedent Mistich. No other representative of Stephen A. Mistich existed at this time.

On April 4, 1990, nearly one year after judgment was rendered and nearly one month after oral arguments were heard by the Court of Appeal, the executrix of decedent's estate was confirmed in such capacity and sought to be substituted as the sole proper party plaintiff-appellee.

Interestingly enough, while recognizing that this case arises under the Jones Act, 46 U.S.C. Section 688, and the general maritime law, the executrix conceded that Louisiana Code of Civil Procedure Article 801 and Rule 2-9 of the Uniform Rules of Louisiana Courts of Appeal, controlled the substitution of parties. (See Appendix 3.)

However, the executrix erred in relying upon Louisiana Code of Civil Procedure Article 801(2) and not 801(1). The executrix clearly misinterpreted Article 801 in support of her assertion that the estate was the correct party to be substituted for the decedent.

After supporting the applicability of Louisiana procedural law, the executrix changed horses and cited two federal maritime cases, Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) and Connors v. Gallick, 339 F.2d 381 (6th Cir. 1964) as authority for her proper party status, citing the dissenting opinion of Justice Powell in Gaudet as authority.

On June 1, 1990, the Court of Appeal correctly denied the executrix's Motion to Substitute, citing Nathan v. Touro Infirmary, 512 So.2d 352 (La. 1987), a case fully supporting the position that Louisiana Code of Civil Procedure Article 801(2) applies strictly to property damage or contract cases, but not to personal injury cases.

On June 26, 1990, the executrix applied for supervisory and other writs to the Louisiana Supreme Court, which writs

were denied on September 14, 1990, further confirming that the children of Mistich are the proper parties in interest to this lawsuit.

On September 4, 1990, the Court of Appeal, in denying Brown & Root, Inc.'s Peremptory Exception of No Right of Action, ruled:

MOTION IS DENIED.

> The peremptory exception of no right of action brought by Brown & Root, Inc. is denied. Under the circumstances of this case the children of Stephen A. Mistich were merely substituted as proper parties plaintiff in a personal injury claim which their father had already asserted and had obtained judgment.
>
> * * *
>
> This is not a situation where there exists a "survival action" claim to be prosecuted and therefore the rules under the Jones Act and general maritime law relative to what party has the right to assert the claim does not apply.
> (See Appendix 1.)

Having been unsuccessful in her prior attempts to be recognized as the real party in interest and justly so, on November 14, 1990, the executrix planned a new strategy, couched her arguments in new terms, and filed a different pleading (Motion to Intervene) all in an effort to accomplish the same goal.

However, this time, the executrix pulled out all of the stops. After conceding:

> "As the children themselves have argued 'clearly this is a La. C.C.P. Article 801 substitution and a

> procedural matter governed by the law of the forum (Louisiana).' . . . We suggest that they are correct."
> (See Appendix 4),

the executrix lent a significant portion of her supporting memorandum to matters both irrelevant and which were neither in the record nor before the Court of Appeal.

In sheer desperation, the executrix referred to a will that purportedly left Mistich's sole surviving children next to nothing, thus deliberately insinuating a negative relationship between the decedent and his children, seeking to invoke prejudice. Although respondents vehemently dispute such a relationship, this discussion is germane to no aspect of this appeal and has absolutely no relevance in this Honorable Court's decision-making process. The conclusion that the executrix's motive was to invoke prejudice is inescapable given the fact that in prior pleadings the executrix admitted:

> "Mr. Mistich's testacy or intestacy is completely irrelevant to the legal issues in the appeal of this case to this Court. Brown & Root, Inc.'s motion for a stay does not and cannot expressly assign any actual legal significance herein to the will. Indeed, there is none."
> (See Appendix 5.)

Therefore, as expected, on December 28, 1990, the Court of Appeal denied the executrix's Motion to Intervene, ruling that in accordance with La. C.C.P. Article 801 and La. C.C. Article 2315.1, the proper parties to be substituted as the legal successors are the children of Mistich.

Now the executrix seeks writs to this Honorable Court asking that, despite correct rulings by the Court of Appeal and the

Louisiana Supreme Court regarding substitution of parties, this Court determine new issues not addressed by the courts below.

SUMMARY OF ARGUMENT

The decision of the Louisiana Court of Appeal, Fourth Circuit, denying the motion of the executrix of decedent's estate to be substituted in place of decedent in the appeal of his personal injury lawsuit, following the proper substitution of decedent's children, was correct, as was the denial of the executrix's subsequent application for supervisory or other writs to the Court of Appeal, Fourth Circuit, by the Louisiana Supreme Court. As the executrix has petitioned this Honorable Court in response to the denial of her motion to be substituted, it is the denial of this procedural substitution alone that is before the Court.

The Court of Appeal correctly applied Louisiana appellate procedural law to this state court action and this has been judicially admitted by the executrix in her attempt to intervene in this matter. In fact, although the executrix has consistently argued for the application of state procedural law at the state court level, upon being confronted with an unfavorable determination therefrom, she now seeks to deny its applicability and contradicts herself by invoking the assistance of federal substantive and procedural law. Clearly, since even the executrix acknowledges that the procedural substitution by the Court of Appeal was correct, any review of such a determination at this level should be moot.

Furthermore, contrary to petitioner's argument, respondents submit that federal uniformity is in no way compromised by the decisions of the state court, nor is federal procedural law even applicable in this matter. It is further submitted that federal procedural law would not produce an inconsistent result in this matter. The Louisiana courts properly denied the executrix's

motion to be substituted under the relevant procedural articles and such action does not warrant review by this Honorable Court.

ARGUMENT

It is axiomatic that state procedural rules govern actions in state courts under the "saving to suitors" clause (28 U.S.C. Section 1333(1)). See Exxon Corp. v. Choo, 817 F.2d 307 (5th Cir. 1987) (reversed on other grounds), 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed 2d 127 (1988).

Consequently, on January 8, 1990, the sole surviving children of Stephen A. Mistich were properly substituted upon his death as plaintiffs-appellees according to Louisiana Code of Civil Procedure Article 801(1), Rule 2-9 of the Uniform Rules of Louisiana Courts of Appeal, and Louisiana Civil Code Article 2315.1.

Rule 2-9 of the Uniform Rules of Louisiana Courts of Appeal specifically provides that:

> The rules and procedures for substitution of parties provided by LSA-C.C.P. Arts. 801-807 shall regulate the substitution of parties.

La. C.C.P. Article 801 incorporates Louisiana Civil Code Article 2315.1 for the purpose of determining the proper parties to be substituted. Even the executrix of the estate of Stephen Mistich has previously admitted that this matter involves a La. C.C.P. Article 801 substitution of parties, although she contends she is the proper party. (See Appendix 3.)

La. C.C.P. Article 801 provides:

> **Voluntary substitution for deceased party; legal successor**

> When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality.
>
> As used in Articles 801 through 804, "legal successor" means:
>
> (1) The survivors designated in Article 2315.1 of the Civil Code, if the action survives in their favor; and
>
> (2) Otherwise, it means the succession representative of the deceased appointed by a court of this state, if the succession is under administration therein; or the heirs and legatees of the deceased, if the deceased's succession is not under administration therein. (Emphasis added).

Louisiana Civil Code Article 2315.1 entitled, "Survival action" states:

> A. If a person who has been injured by an offense or quasi-offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi-offense, shall survive for a period of one year from the death of the deceased in favor of:
>
> (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children;

(2) The surviving father and mother of the deceased, or either or them if he left no spouse or child surviving; and

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

B. In addition, the right to recover all damages for injury to the decedent, his property or otherwise, caused by the offense or quasi offense, may be urged by the decedent's succession representative in the absence of any class of beneficiary set out in the preceding Paragraph.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively. (Emphasis added).

Additionally, the Federal Employees Liability Act, 45 U.S.C. Section 59, incorporated by specific reference into the Jones Act (46 U.S.C. 688), entitled, "Survival of right of action of person injured", provides:

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin

> dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

There is no material difference between Louisiana law and applicable federal law when it comes down to a determination of what takes place when an injured person dies.

Stephen A. Mistich died following the rendition of judgment without a surviving spouse and, accordingly, under La. C.C. Article 2315.1 and 45 U.S.C. Section 59 his three surviving children are his legal successors to the exclusion of any other ascending or collateral survivors, and, as such, are entitled to be substituted as parties plaintiff under La. C.C.P. Article 801. The federal statute is cited merely for the purpose of showing to the Court that the Mistich children are the beneficiaries under both federal and state law and not in any way to imply that federal law is controlling. This is a state court action authorized under the "saving to suitors" clause, and state procedural law is applicable just as federal procedural law would be applicable in a diversity case filed in a federal forum.

Accordingly, the succession representative has no role in this case since Louisiana Civil Code Article 2315.1, incorporated in La. C.C.P. Article 801, requires the designated beneficiaries to appear in personam. Under the Louisiana procedure, the succession representative is permitted to take part only in the "absence of any class of beneficiaries" set forth in La. C.C. Article 2315.1. (See La. C.C. Article 2315.1(B) and La. C.C.P. Article 801.) The substituted children are, of course, a primary class of beneficiaries under La. C.C. Article 2315.1.

The executrix previously alleged to the Court of Appeal in her motion to be substituted that she is the proper party plaintiff under applicable Louisiana law citing La. C.C.P. Article 801(2). A literal reading of that section will disclose its inapplicability to

the instant matter because of the presence of designated beneficiaries. Additionally, the courts of Louisiana have consistently held that La. C.C.P. Article 801(2) applies strictly to property damage or contract cases, but not to tort personal injury cases like the present. Nathan v. Touro Infirmary, 512 So.2d 352 (La. 1987). The Court of Appeal recognized this and made no error in its determination of the proper parties to be substituted.

After supporting the applicability of Louisiana procedural law, La. C.C.P. Article 801, in her original Motion to Substitute, the executrix changes horses and cites two federal maritime cases, Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed. 2d 9 (1974) and Connors v. Gallick, 339 F.2d 381 (6 Cir. 1964), as authority for her alleged proper party status, citing the dissenting opinion of Justice Powell in Gaudet as authority. Gaudet was a death action by a widow of a longshoreman. The longshoreman had recovered during his lifetime for personal injuries and the threshold question was the right of a survivor to assert a wrongful death action in addition to the previously concluded personal injury action. The present case is not a death action by a survivor, but a personal injury action by a seaman. Gaudet stands for the proposition that the surviving children of Mistich may have a viable death action in addition to his personal injury action but that cause of action, if any, is not before this Court. Gaudet says nothing that is germane to the issues presented herein.

Connors v. Gallick, 339 F.2d 381 (6 Cir. 1964) in dicta makes the statement that a personal injury judgment under the FELA belongs to the estate of the deceased plaintiff in judgment. First, Connors is not a state court action. Second, a careful reading of the case will disclose that the widow and executrix of the estate entered into a settlement on behalf of herself and all heirs of the decedent and the real issue was the validity of the settlement under attack by a questionable daughter. The Court held the settlement by the obvious beneficiary to be valid. This

case does not in any way tarnish the clear intent of La. C.C.P. Article 801, La. C.C. Article 2315.1 and 45 U.S.C. Section 59, or the established jurisprudence mandating that the rights of survivors under federal, or state law, do not form a part of a decedent's estate. Connors is clearly an aberration under the well-established law that the cause of action which survives under the FELA provision does not survive for the benefit of the decedent's estate, but for the listed beneficiaries in the order specified. 45 U.S.C. Section 59; Hogan v. New York Central R. Co., 223 F 890 (D.C.N.Y. 1915).

In connection with the aforementioned argument, it is imperative to point out that the executrix has petitioned this Honorable Court solely to review the denial of her motion to be substituted. No other substantive issue is presented, petitioner's discussions to the contrary notwithstanding. The executrix judicially admits that the Court of Appeal's determination was merely a procedural one and even suggests that it was correct. Yet, she paradoxically seeks relief from this Honorable Court. It is submitted that, in light of these circumstances, no review is warranted by this Honorable Court.

Furthermore, as previously mentioned, it is interesting to note that the executrix has asserted the application of state procedural law throughout her involvement in the appeal of this matter. It is only after she has been unsuccessful in her attempts to have herself substituted through state law that she asserts the applicability of federal substantive and procedural law. It is with this change of heart that she appears before this Honorable Court with hopes of laying claim to the significant monetary judgment to which decedent's children are rightly entitled. Her intentions are readily apparent and should not be supported.

Finally, the executrix argues in her petition that federal uniformity would be served should she be substituted as the plaintiff-appellee. This argument is merely a "red herring" to

persuade this Honorable Court to review the proper determination made by the Louisiana appellate court. There clearly is no federal issue involved here, much less any conflict with federal decisions. A procedural substitution of parties has been accomplished in state court, applying state law, in order that the personal injury action of a plaintiff who died pending appeal could continue forward to a definitive judgment. This substitution, it is respectfully submitted, was correctly executed by the Louisiana appellate court with no damage to any body of federal law, and therefore this action need not be reviewed.

CONCLUSION

Applying state procedural rules pursuant to the "saving to suitors" clause, which it was bound to do, the Louisiana Court of Appeal for the Fourth Circuit properly substituted the sole surviving children of Stephen Arthur Mistich in his stead upon his death after he had obtained a personal injury judgment, but while the matter was on appeal.

The executrix of decedent's estate, while conceding the correctness of the Court of Appeal's ruling, now contends, improperly, that federal procedural and substantive law controls substitution of parties, all in an effort to obtain the fruits of a judgment not rightfully hers.

Respectfully submitted,

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APPENDIX 1

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * * * *

PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

MOTION IS DENIED.

The peremptory exception of no right of action brought by Brown and Root, Inc. is denied. Under the circumstances of this case the children of Stephen A. Mistich were merely substituted as proper parties plaintiff in a personal injury claim which their father had already asserted and had obtained judgment. This is not a situation where there exists a "survival action" claim to be prosecuted and therefore the rules under the Jones Act and general maritime law relative to what party has the right to assert the claim does not apply.

New Orleans, Louisiana this 4th day of September, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Bernard Armstrong

APPENDIX 2

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * * * *

The Petition for Intervention filed by Hettie M. Minnick is denied. Under Louisiana Code of Civil Procedure Article 801 and Louisiana Civil Code Article 2315.1 the proper party to be substituted as the legal successor are the children of the deceased plaintiff.

New Orleans, Louisiana, this 28th day of December, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Bernard Armstrong

APPENDIX 3

FOURTH CIRCUIT COURT OF APPEALS

STATE OF LOUISIANA

No. 89-CA-1420

STEPHEN A. MISTICH

VS.

PIPELINES, INC. ET AL

ON APPEAL FROM THE 25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES, NO. 29-703, DIVISION "B", JUDGE EMILE E. MARTIN, III PRESIDING

MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE PARTY

MAY IT PLEASE THE COURT:

Mover, Hettie M. Minnicks is the mother of the deceased original plaintiff, Stephen A. Mistich, and the executrix of the Succession of Stephen A. Mistich in Louisiana. Under Louisiana Code of Civil Procedure Articles (La.C.C.P. Art.) 426 and 801(2), the latter made applicable by La.C.C.P. Art. 821 and Uniform Rules, Courts of Appeal, Rule 2-9, mover is the sole proper party plaintiff-appellee to be substituted herein.

La.C.C.P. Art. 426 reads:

> **Transmission of Action and Right to Enforce Obligation**
>
> An action to enforce on obligation is the property of the obligee which of his death is transmitted with his estate to his heirs, universal legatees, or legatees under a universal title, except as otherwise provided by law.

La.C.C.P. Art. 801 reads:

> **Voluntary Substitution for Deceased Party; Legal Successor.**
>
> When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality.
>
> As used in Articles 801-804, "Legal Successor" means:
>
> (1) The survivors designated in Article 2315.1 of the Civil Code, if the action survives in their favor; and
>
> (2) Otherwise, it means the succession representative of the deceased appointed by a Court of this state, if the succession is under administration therein; or the heirs

> and legatees of the deceased, if the deceased's succession is not under the administration therein.

Since a judgment was rendered on April 28, 1989 in favor of original plaintiff, Stephen A. Mistich, while he was alive and before his May 14, 1989 death, there is no survival action which existed under Article 2315.1 of the Louisiana Civil Code, contrary to the January 4th, 1990 Motion for Substitution of Parties of Brandon Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich as natural tutrix of Shawn A. Mistich, the original plaintiff's adopted children.

The case herein arises, not under Articles 2315 or 2315.1 of the Louisiana Civil Code, but under the Jones Act, 46 United States Code (USC) 688 and the general maritime law.

Nathan vs. Touro Infirmary, 512 So.2d 352,353 (La. 1987), a La.C.C. Art. 2315 case, does apply here to the extent it characterizes an action commenced before the original plaintiff's death as "a property right that was transmitted upon his death to his heirs or legatees". Nathan at 355 cites J. Wilton Jones Co. vs. Liberty Mutual Insurance Co., 248 So.2d 878, 892 and confirms the correctness of the earlier case in finding that in La.C.C.P. Art. 801(2), the "Otherwise" in that article can reasonably be read to cover situations where, as here, there is not a La.C.C. Art. 2315 personal injury suit involved.

The reply brief on behalf of Stephen A. Mistich at page 24 relies upon Robertson vs. Wegmann, 985 S.Ct. 1991, 436 U.S. 584, 56 L.Ed. 554 (1978) for the erroneous assertion that the adopted children were the proper parties to be substituted. Robertson held that a 42 USC 1983 civil rights action, commenced by plaintiff Shaw, but not brought to judgment before his death, would be governed by La.C.C. Art. 2315's survivorship rules.

This case's holding has been confined to its narrow fact situation, and would not apply to the case herein. See Ashcraft vs. Louisiana Coca-Cola Bottling Co., Ltd., 658 F. Supp. 772 (E.D. La. 1987) at page 774, note 1, stating Robertson "holds only that the abatement of a Section 1983 action be a plaintiff who died without relatives did not, in those narrow circumstances, make state law inconsistent with federal law." Ashcraft also holds La.C.C. Art. 2315.1 is limited to the causes of action for offenses and quasi offenses in Articles 2315 through 2324.

The fact situation here does fall under the holding of Connors vs. Gallick, 339 F.2d 381 (6 Cir. 1964), a Federal Employers Liability Act (FELA) (45 U.S.C. 51) case which involved a railroad employee who died after receiving a trial court judgment, raising the question of whether the survivorship provision of the FELA (45 U.S.C. 59) applied to a settlement by the employee's estate to the exclusion of his daughter. This survivorship provision is incorporated by reference into the Jones Act. The court held that the survivorship provision did not apply and that the judgment and resulting settlement belonged to the employee's estate:

> Gallick in his lifetime had prosecuted his own cause of action to judgment, and his death did not abate his action or vacate his judgment.
>
> ***
>
> Gallick dies possessed not of an unlitigated cause of action, but of a judgment which became part of his estate.

Also see Kirby vs. Albert T.J., 517 So.2d 974 (La.App. 3 Cir. 1987), confirming that a plaintiff's death, after trial court judgment and pending appeal, merges the plaintiff's action into a final judgment so that neither could the action lapse nor the

judgment fall be the death of the plaintiff.

Miles vs. Melrose, 882 F2d 976 (5th Cir. 1989), cited at p. 13 of the original brief on behalf of Brown & Root, Inc., is decisively distinguishable from the case at hand. Melrose concerned actions for wrongful death and survival brought by the decedent's mother for herself and the decedent's estate, and was not, as here, an action for injuries prosecuted to judgment by the seaman himself.

Accordingly, this Court is urged to substitute mover, Hettie M. Minnicks, as executrix of the succession of original plaintiff Stephen A. Mistich, herein as the sole and proper party plaintiff appellee.

Respectfully submitted,

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APPENDIX 4

COURT OF APPEAL FOURTH CIRCUIT

STATE OF LOUISIANA

NO. 89-CA-1420

Stephen A. Mistich
Plaintiff Appellee/Cross - Appellant

vs.

Brown & Root, Inc.
Dependant - Appellant

MEMORANDUM IN SUPPORT OF PETITION OF INTERVENTION

* * *

Thus, in light of the above, this court, in applying state law to the question of substitution, must be considered to have treated it as a mere procedural questions not requiring the application of federal maritime law in this saving to suitors clause case. Therefore, the only question decided in the order of June 1, 1990 had to do with mere standing to continue the action (procedural capacity) and not with the ultimate beneficiary in interest. It had to do with mere representative standing. As the children themselves have argued "Clearly this is a La.C.C.P. Article 801 substitution and a procedural matter governed by the law of the forum (Louisiana)." Opposition To Motion To Stay Proceedings Pending Determination of Proper Party Substitution, page 85. The children repeat this judicial admission throughout their previous Opposition. Id at 82, 83, 85. We suggest that they

are correct. That this is all that was previously decided by this Court and that the children have judicially admitted it.

* * *

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid and properly addressed, this 14th day of November, 1990.

(SIGNED) FRANK H. WALK, JR.

APPENDIX 5

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

NO. 89-CA-1420

STEPHEN A. MISTICH

Plaintiff-Appellee/
Cross-Appellant

VS.

BROWN & ROOT, INC.

Defendant-Appellant

MEMORANDUM IN OPPOSITION TO
BROWN & ROOT, INC.'S MOTION TO STAY

MAY IT PLEASE THE COURT:

* * *

Defendant-appellant Brown & Root, Inc. in its motion to stay discusses the existence of a last will and testament left by the decedent Stephen A. Mistich. However, the existence of a will does not support in any way the motion for a stay. Mr. Mistich's testacy or intestacy is completely irrelevant to the legal issues in

the appeal of this case to this Court. Brown & Root's motion for a stay does not and cannot expressly assign any actual legal significance herein to the will. Indeed there is none.

* * *

Respectfully submitted,

(SIGNED) FRANK H. WALK, JR.
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Certificate of Service

I hereby certify that a copy of the foregoing has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid and properly addressed, this 15th day of May, 1990.

(SIGNED) FRANK H. WALK, JR.